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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA
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9 RAYMOND T. BALVAGE, et al.,
10 Plaintiffs,
11 v.
12 RYDERWOOD IMPROVEMENT AND
13 SERVICE ASSOCIATION, INC.,
14 Defendant.

15 CASE NO. C09-5409BHS
16 ORDER ON PARTIES' MOTIONS
17 FOR SUMMARY JUDGMENT
18

19 This matter comes before the Court on Plaintiffs' second motion for partial
20 summary judgment (Dkt. 128) and Defendant Ryderwood Improvement and Service
21 Association, Inc.'s ("RISA") motion for summary judgment regarding 2007 survey (Dkt.
22 133). The Court has considered the pleadings filed in support of and in opposition to the
motions and the remainder of the file and hereby denies the motions for the reasons stated
herein.

19 **I. PROCEDURAL AND FACTUAL BACKGROUND**

20 For a more complete factual background, see the Court's order issued June 4,
21 2010 (Dkt. 42 at 2-5) and the Ninth Circuit Court of Appeals opinion issued April 27,
22 2011 (Dkt. 108).

1 On July 8, 2009, Plaintiffs Raymond and Deborah Balvage and Charles and Susan
2 Weaver, individually and on behalf of their marital communities and on behalf of a class
3 of similarly situated individuals (collectively, “Plaintiffs”), filed a complaint against
4 RISA. Dkt. 1. On November 10, 2009, Plaintiffs filed an amended complaint. Dkt. 11.
5 On June 2, 2010, Plaintiffs filed their second amended complaint. Dkt. 41. In their
6 second amended complaint, Plaintiffs allege that RISA violated the Federal Fair Housing
7 Act (“FHA”), 42 U.S.C. § 3604(c), et seq., by engaging in illegal housing discrimination
8 on the basis of familial status, and seek declaratory and injunctive relief. *Id.* at 12-16.

9 On June 4, 2010, the Court granted in part Plaintiffs’ motion for partial summary
10 judgment concluding that, based on the HUD Memo, RISA could not “claim the HOPA
11 exemption because it continued to discriminate while attempting to comply with the
12 verification requirements.” Dkt. 42 at 12-13. On August 11, 2010, the Court granted
13 Plaintiffs’ motion to issue a preliminary injunction ordering RISA to, among other things,
14 remove all age restrictions from its bylaws, remove all signage that stated its 55 and older
15 restrictive covenants and inform residents and local real estate agents that the Court had
16 ordered RISA to immediately cease enforcement of its age restrictions. Dkt. 75. On
17 September 1, 2010, the Court granted RISA’s motion for a discretionary appeal under 28
18 U.S.C. § 1292(b), concluding that the questions presented were controlling issues of law
19 and that there were substantial grounds for differences of opinion. Dkt. 92. The Court
20 stayed the action, with the exception of RISA’s pending motion for partial summary
21 judgment, and certified the action to the Ninth Circuit Court of Appeals. *Id.* On
22

1 September 21, 2010, the Court granted RISA's motion for partial summary judgment
 2 concluding that RISA's bylaws are enforceable as covenants. Dkt. 100.

3 On April 27, 2011, the Ninth Circuit issued its opinion on RISA's appeal reversing
 4 the Court's interpretation of the HUD Memo, holding that:

5 a residential community that has continuously operated as a retirement
 6 community for persons age 55 or older can qualify for the housing for older
 7 persons exemption from the Fair Housing Act's prohibition on familial
 8 status discrimination by establishing that it currently satisfies the
 9 exemption's three statutory and regulatory criteria at the time of the alleged
 10 violation, even if the community enforced age restrictions when it first
 11 achieved compliance with the exemption's age verification requirement.

12 *Balvage v. Ryderwood Improvement and Service Ass'n, Inc.*, 642 F.3d 765, 768-69 (9th
 13 Cir. 2011). Further, the Ninth Circuit held that

14 [t]he [district] court properly concluded that RISA did not qualify for the
 15 HOPA exemption between May 2000 and September 2007, when RISA
 16 completed its first HOPA verification survey, because during that time
 17 RISA did not verify by reliable surveys and affidavits—or through other
 18 adequate means—that at least 80 percent of its occupied units were
 19 occupied by at least one person who was 55 years of age or older.

20 *Id.* at 776 (citing 42 U.S.C. § 3607(b)(2)(C)(iii)). Accordingly, the Ninth Circuit
 21 remanded the action to this Court to address the parties' dispute as to “whether RISA’s
 22 September 2007 survey satisfies the statutory and regulatory criteria.” *Id.* at 780.

23 On April 12, 2012, Plaintiffs filed their second motion for partial summary
 24 judgment. Dkt. 128. On April 30, 2012, RISA responded (Dkt. 136) and on May 4,
 25 2012, Plaintiffs replied (Dkt. 142). Also on April 12, 2012, RISA filed its motion for
 26 summary judgment regarding the 2007 survey. Dkt. 133. On April 30, 2012, Plaintiffs
 27 responded to RISA’s motion (Dkt. 139) and on May 4, 2012, RISA replied (Dkt. 143).

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply “some metaphysical doubt”). See also Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

18 The determination of the existence of a material fact is often a close question. The
19 Court must consider the substantive evidentiary burden that the nonmoving party must
20 meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
21 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
22 issues of controversy in favor of the nonmoving party only when the facts specifically

1 attested by that party contradict facts specifically attested by the moving party. The
 2 nonmoving party may not merely state that it will discredit the moving party's evidence
 3 at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W.*
 4 *Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,
 5 nonspecific statements in affidavits are not sufficient, and missing facts will not be
 6 presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

7 **B. The Parties' Motions for Summary Judgment Regarding the 2007 Survey**

8 The main issue remaining following the Ninth Circuit's remand of this matter is
 9 whether RISA conducted a proper survey in 2007 sufficient to meet the verification
 10 requirements of 42 U.S.C. § 3607(b)(2)(C)(iii) and 24 C.F.R. § 100.307. *See Balvage*,
 11 642 F.3d at 780. Plaintiffs' motion for partial summary judgment asks the Court to
 12 conclude, as a matter of law, that RISA's 2007 survey was inadequate under the
 13 applicable statute and regulations.¹ Dkt. 128. RISA's motion for summary judgment
 14 asks the Court to conclude, as a matter of law, that RISA's 2007 survey was adequate
 15 under the statute and therefore, RISA is in compliance with HOPA and this action should
 16 be dismissed. Dkt. 133.

17 **1. Statutory and Regulatory Requirements**

18 RISA bears the burden of establishing its compliance with each of the three
 19 statutory and regulatory requirements. *Balvage*, 642 F.3d at 777 (referencing 42 U.S.C. §
 20

21
 22 ¹ Plaintiffs also argue in their motion that RISA's bylaws are void and therefore
 unenforceable, which will be addressed by the Court in a separate section of this order.

1 3607(b) and 24 C.F.R. § 100.304 – 100.307). The statute requires that RISA show the
 2 following elements have been met:

- 3 (i) at least 80 percent of the occupied units are occupied by at least
 one person who is 55 years of age or older;
- 4 (ii) the housing facility or community publishes and adheres to
 policies and procedures that demonstrate the intent required under this
 subparagraph;
- 5 (iii) the housing facility or community complies with rules issued by
 the Secretary for verification of occupancy, which shall—
 - 6 (I) provide for verification by reliable surveys and affidavits;
 and
 - 7 (II) include examples of the types of policies and procedures
 relevant to a determination of compliance with the requirement of clause
 (ii).

9 42 U.S.C. § 3607(b)(2)(C). Section 100.307 of the companion regulation lists the
 10 requirements for verification of occupancy:

11 (a) In order for a housing facility or community to qualify as housing
 12 for persons 55 years of age or older, it must be able to produce, in response
 13 to a complaint filed under this title, verification of compliance with
 § 100.305 through reliable surveys and affidavits.

14 (b) A facility or community shall, within 180 days of the effective
 15 date of this rule, develop procedures for routinely determining the
 16 occupancy of each unit, including the identification of whether at least one
 17 occupant of each unit is 55 years of age or older. Such procedures may be
 18 part of a normal leasing or purchasing arrangement.

19 (c) The procedures described in paragraph (b) of this section must
 20 provide for regular updates, through surveys or other means, of the initial
 21 information supplied by the occupants of the housing facility or
 22 community. Such updates must take place at least once every two years. A
 survey may include information regarding whether any units are occupied
 by persons described in paragraphs (e)(1), (e)(3), and (e)(4) of § 100.305.

23 (d) Any of the following documents are considered reliable
 24 documentation of the age of the occupants of the housing facility or
 25 community: (a) Driver's license; (2) Birth certificate; (3) Passport; (4)
 26 Immigration card; (5) Military identification; (6) Any other state, local,
 27 national, or international official documents containing a birth date of
 28 comparable reliability; or (7) A certification in a lease, application,
 affidavit, ro other document signed by any member of the household age 18

1 or older asserting that at least one person in the unit is 55 years of age or
2 older.

3 (e) A facility or community shall consider any one of the forms of
4 verification identified above as adequate for verification procedures
5 required by this section.

6 (f) The housing facility or community must establish and maintain
7 appropriate policies to require that occupants comply with the age
8 verifications procedures required by this section.

9 (g) If the occupants of a particular dwelling unit refuse to comply
10 with the age verification procedures, the housing facility or community
11 may, if it has sufficient evidence, consider the unit to be occupied by at
12 least one person 55 years of age or older. Such evidence may include:

13 (1) Government records or documents, such as a local
household census;

14 (2) Prior forms or applications; or

15 (3) A statement from an individual who has personal
knowledge of the age of the occupants. The individual's statement must set
forth the basis for such knowledge and be signed under the penalty of
perjury.

16 (h) Surveys and verification procedures which comply with the
17 requirements of this section shall be admissible in administrative and
judicial proceedings for the purpose of verifying occupancy.

18 (i) A summary of occupancy surveys shall be available for
inspection upon reasonable notice and request by any person.

19 24 C.F.R. § 100.307(a)-(i).

20 **2. Evidentiary Issues**

21 Whether there is a material question of fact that precludes summary judgment in
22 favor of either party on the issue of the 2007 Survey centers on the Court's treatment of
the declarations submitted by the parties in support of their motions for summary
judgment.

RISA, in support of its motion for summary judgment and opposition to Plaintiffs' motion, relies on the declarations of Sally-Gene DeBriae ("DeBriae") (Dkt. 24) and Frances Sanders ("Sanders") (Dkt. 138) to support its argument that the 2007 Survey was

1 administered in a way that satisfies the regulations and more specifically, that occupants,
2 not owners, were in fact surveyed. Plaintiffs maintain that DeBriae does not have
3 personal knowledge of how the 2007 Survey was administered and therefore her
4 declaration should be stricken. Dkt. 139 at 8. In addition, Plaintiffs argue that Sanders's
5 recent declaration stating that RISA's list of property owners was extensively fact-
6 checked in September 2007 is contradicted by her prior deposition when she testified that
7 it was not her job to verify the accuracy of the information and that she simply compared
8 a list she was given against documents RISA had on file. Dkt. 142 at 5-7, 11 (citing
9 Dkts. 129-1 and 138). Accordingly, Plaintiffs contend that Sanders's most recent
10 declaration (Dkt. 138) is contradicted by her prior testimony and is therefore a sham and
11 should be disregarded by the Court. Dkt. 142 at 6-7.

12 Plaintiffs, in support of their motion for partial summary judgment, submitted the
13 declarations of Joyce Adams ("Adams") (Dkt. 130), Joyce Fischer ("Fischer") (Dkt. 131),
14 and Claudia Drake ("Drake") (Dkt. 132), to support their argument that the 2007 Survey
15 was administered in a way that does not satisfy the statutory and regulatory requirements.
16 Dkt. 128. RISA maintains that Adams's and Fischer's declarations contradict their
17 previous deposition testimony and that Drake's declaration contradicts a sworn affidavit
18 she executed in 2007, as well as two additional documents. Dkt. 136 at 3-8.

19 Based on the arguments made by the parties, the Court must decide whether any of
20 the evidence described above is not supported by personal knowledge of the facts
21 testified to or contradicted by previous testimony to the extent that such evidence should
22 be considered inadmissible for purposes of summary judgment.

1 The Court makes the following evidentiary rulings with respect to the various
 2 declarations submitted by the parties.²

3 **a. Answers to Plaintiffs' Third Set of Interrogatories**

4 Plaintiffs argue that the portions of RISA's motion for summary judgment that
 5 rely on RISA's answers to Plaintiffs' third set of interrogatories (Dkt. 135-6), which were
 6 verified by DeBriae, should be stricken because DeBriae lacked any personal knowledge
 7 of the 2007 Survey. Dkt. 139 at 8-9. Specifically, Plaintiffs ask the Court to strike the
 8 following pages and lines of RISA's motion: 8:13-15, 9:3-4, 11:2-3, 14:2-8, and 16:2-5.

9 First, the Court concludes that the lines on pages 14 and 16 need not be stricken
 10 because they are supported by the declaration of Sanders (*see* Dkt. 133 at 14:2-8 & 16:2-
 11 5 (citing Dkt. 138)). However, the Court concludes that Plaintiffs are entitled to have the
 12 requested lines on pages 8, 9, and 11 stricken because RISA has failed to show that
 13 DeBriae possessed any personal knowledge of the 2007 Survey. The Court notes that the
 14 lines on these three pages that will be stricken are general statements introducing the
 15 2007 Survey and are not critical to the Court's analysis of RISA's administration of the
 16 survey.

17 **b. Declarations Contradicted by Prior Testimony**

18 The Ninth Circuit has held that "a party cannot create an issue of fact by an
 19 affidavit contradicting his prior deposition testimony." *Kennedy v. Allied Mutual Ins.*

20
 21 ² The Court notes that, although it has concluded that the parties' declarations are not a
 22 sham and will be considered by the Court, the parties may address any inconsistencies in
 witnesses' testimony on cross-examination at trial.

1 | *Co.*, 952 F.2d 262, 266 (9th Cir. 1991). However, the “rule does not automatically
2 | dispose of every case in which a contradictory affidavit is introduced to explain portions
3 | of earlier deposition testimony.” *Id.* at 266-67. Rather, the district court should be
4 | concerned with whether the “‘sham’ testimony flatly contradicts earlier testimony in an
5 | attempt to ‘create’ an issue of fact and avoid summary judgment.” *Id.* at 267.
6 | Accordingly, “the district court must make a factual determination that the contradiction
7 | was actually a ‘sham’” before disregarding the affidavit or declaration. *Id.*

8 **i. Sanders’s Declaration**

9 | RISA submitted the declaration of Sanders (Dkt. 138) in support of its motion for
10 | summary judgment. In their reply to RISA’s response to their motion for partial
11 | summary judgment, Plaintiffs argue that “revised” testimony contained in Sanders’s
12 | declaration is a sham as it is contradicted by her prior deposition testimony and should be
13 | disregarded by the Court. Dkt. 142 at 6-7. Specifically, Plaintiffs contend that Sanders
14 | testified during her deposition that it was not her job to make sure that the information
15 | regarding names, addresses, and phone numbers on a list she was given were accurate.
16 | Dkt. 142 at 6 (citing Dkt. 129-1 at 14). However, in her most recent declaration, Sanders
17 | states that RISA’s list of property owners (attached as Exhibit 2 to her declaration) was
18 | extensively fact-checked in September 2007. Dkt. 138 at 4.

19 | As an initial matter, the Court notes that although Plaintiffs state that Sanders’s
20 | “revised” testimony should be disregarded, they fail to make a proper motion to strike to
21 | which RISA could respond. Regardless, the Court concludes that Plaintiffs have failed to
22 |

1 show that Sanders's testimony is so contradictory as to warrant a finding that the later
2 testimony is a sham.

3 During her deposition, Sanders stated that counsel was correct when he asked if it
4 was her job to review the files in that she was "to go through all the people on the list and
5 make sure that there was stuff for them" and that counsel was correct when he stated that
6 she was not "involved in getting information that was missing, just verifying the
7 information was already there." Dkt. 129-1 at 12. The "list" that was discussed during
8 Sanders's deposition was, according to Sanders, a list of names and addresses of people
9 in Ryderwood that was kept in the RISA office and had been given to her by either Drake
10 or Fischer and had been worked on by Fischer. *Id.* at 13. When Sanders was asked
11 whether, in working on the 2007 Survey, it was part of her responsibility to make sure
12 that "the information on the survey about names and addresses and phone numbers" were
13 accurate, she testified that it was not. *Id.* at 14. She stated that she did not know when
14 the list of names, addresses, and phone numbers was created but that "[i]t was updated on
15 a regular basis" and that she did not know who updated it after DeBraie was no longer in
16 the office. Dkt. 129-1 at 14. Counsel then asked Sanders if it was her "job to go through
17 and make sure . . . that RISA had age verification information for all of the persons on
18 Exhibit 2," to which she said yes, and when asked where she went to look for that
19 information she stated "[i]n the HOPA files that had been established previously." *Id.* at
20 15.

21 In her declaration, Sanders states that
22

[t]he Survey started from a template provided by the RISA Board to me labeled "HOPA SURVEY 2007." This document is the same as what is appended here at Exhibit B but did not originally include[] the handwritten notes, which are mine. Those handwritten notes were added by me during the course of completing the age verification survey and reflect my findings.

At the time, I was advised by Ms. Drake that this template document was based on the survey results from 2006 which had been updated by Joyce Fis[c]her through June or July, 2007 to reflect new residents who moved to the community after the 2006 survey was completed. My basis for this understanding was two-fold: *First*, Ms. Drake informed me that Ms. Fischer updated the resident information in June or July of 2007.

Second, Ms. Drake stated that Ms. Fischer updated the resident information in an email she sent to Frank Randolph, who was RISA's attorney at the time.

Dkt. 138 at 3 (emphasis in original). Sanders goes on to say that in conducting the 2007 Survey, she "compared RISA's HOPA designated files against the template survey document and found that the files were very up-to-date. Where discrepancies were found I noted them on the survey." Next, she states that she

reviewed a variety of community records to determine if the template was accurate. This includes, but is not limited, to: (i) resident information saved in RISA's property files from new residents during the year; (ii) the most recent version of the Ryderwood residents telephone directory, which lists resident names only, not owners; (iii) information from Board members; (iv) information from other residents; (v) updated resident names provided to me by members of the "sew-and-sew" club (a Ryderwood volunteer organization that collects names and phone numbers from current residents); (vi) RISA's property index cards showing past and present residents indexed by street address; (vii) information provided by members of the RISA "welcome wagon"; and (viii) RISA's computer files.

Id. at 4.

While some of Sanders's statements from her deposition, when taken by themselves, may look contradictory to certain statements in her declaration, her testimony as a whole is not so inconsistent that the Court could find her declaration to be a sham.

1 Rather, the declaration appears to clarify exactly what Sanders did in reviewing
2 information after receiving the “template” from Drake or Fischer. Whether or not she
3 understood it to be her “responsibility” to ensure that the existing information was
4 accurate, when looking at what Sanders did in reviewing the information and updating
5 the template, it is clear that she was at least attempting to provide accurate updates to the
6 template. Accordingly, the Court concludes that Plaintiffs have failed to show that
7 Sanders’s declaration is a sham and therefore the Court will consider the declaration as
8 evidence in deciding the motions for summary judgment.

9 **ii. Fischer’s Declaration**

10 Plaintiffs submitted the declaration of Fischer in support of their motion for
11 summary judgment. Dkt. 131. In its response to the motion, RISA argues that Fischer’s
12 declaration is a sham in that it contradicts her prior deposition testimony (Dkt. 137-1) and
13 should be disregarded by the Court. Dkt. 136 at 3-6, 19-20.

14 Fischer states in her declaration that “[a]t no time did I make any effort to verify
15 that all the data contained on the List was correct or that it was a complete list of all the
16 property owners in Ryderwood.” Dkt. 131 at 2. RISA argues that Fischer’s deposition
17 testimony contradicts the declaration in that she describes the efforts she took to gather
18 information about the residents in Ryderwood including walking the streets and knocking
19 on doors to obtain identifications, making copies of driver’s licenses when people would
20 come to the office to pay their dues, and creating property files for each home. Dkt. 136
21 at 19-20; *see* Dkt. 137-1. RISA also contends that Fischer’s deposition testimony
22 contradicts her declaration because during the deposition she was asked by counsel if she

1 felt that she had completed the 2006 survey and she answered in the affirmative. Dkt.
2 136 at 19.

3 The Court concludes that RISA has failed to show that Fischer's declaration is a
4 sham. Fischer states in her declaration that she did not make "any effort to verify that *all*
5 *the data* contained on the List was correct or that it was a *complete* list of *all* the property
6 owners in Ryderwood." Dkt. 131 at 2 (emphasis added). This statement does not
7 contradict her deposition testimony in that it appears to the Court that she is clarifying
8 that she did not attempt to verify that the existing data that was on the list given to her
9 was necessarily accurate. In addition, while she may have believed that her efforts in
10 conducting the survey were complete, this is not necessarily contradictory to her
11 statement that she was not verifying that the list they compiled was a "complete list of all
12 the property owners in Ryderwood." *Id.* Therefore, the Court will not disregard
13 Fischer's declaration in deciding the motions for summary judgment.

14 **iii. Adams's Declaration**

15 RISA argues, as it did with Fischer, that Adams's declaration (Dkt. 131) submitted
16 by Plaintiffs in support of their motion for summary judgment is a sham because it
17 contradicts her prior deposition testimony (Dkt. 137-4) and should be disregarded by the
18 Court. Dkt. 136 at 6-7, 20.

19 In her declaration, Adams states that the information she "inserted into the List
20 came from miscellaneous sources, such as post-it notes, ledger cards, and a rolodex.
21 There was no effort made at that time by me or anyone else at TISA to verify that all
22 these sources and notes were correct." Dkt. 130 at 2. RISA contends that this statement

1 contradicts her deposition testimony that Fischer and other volunteers were knocking on
2 doors to get identifications and that she made copies of identifications. Dkt. 136 at 6, 20.

3 The Court concludes that RISA has failed to show that Adams's declaration
4 contradicts her previous testimony. Rather, Adams, like Fischer, appears to state in her
5 declaration that she and the other volunteers were not verifying the accuracy of
6 information that was already on the "list" but were adding information to that list by
7 gathering identifications and other efforts. Accordingly, the Court will not disregard
8 Adams's declaration in deciding the motions for summary judgment.

9 **iv. Drake's Declaration**

10 Unlike the declarants discussed above, Drake is not a party to this action and
11 therefore the "sham" declaration rule established in *Kennedy* does not necessarily apply.
12 However, RISA argues that in *United States v. Southern California Edison Co.*, 413 F.
13 Supp. 2d 1101, 1113 (E.D. Cal. 2006), the court applies the sham declaration rule to
14 experts involved in the case. Because the Court concludes, as discussed below, that
15 Drake's declaration is not a sham, the Court need not actually decide whether the sham
16 rule applies to non-party, non-expert witnesses such as Drake.

17 RISA contends that Drake's declaration is a sham and should be disregarded
18 because her statement that RISA surveyed owners is contradicted by "her previously
19 sworn affidavit that RISA surveyed residents." Dkt. 136 at 21. Plaintiffs maintain that,
20 to the extent Drake's declaration contradicts previous statements she made, such
21 contradiction "is a statement based on reflection, a correction based on Ms. Drake's
22 having considered her position over time." Dkt. 142 at 8.

1 The Court concludes that, even if it considers Drake, a non-party witness, and her
2 previous statements, which are not deposition testimony, to be subject to the sham rule,
3 her declaration is not a sham. Drake states in her declaration that

4 [a]t the time we completed the Survey, it was my understanding that RISA
5 needed only to verify the “owners” of the various residences. Accordingly,
6 I gave direction to the Board that we look through RISA’s files in an
7 attempt to verify that each “owner” on the list was over the age of 55. At
8 the time, I did not want to invade any owner’s privacy by contacting them
9 to require proof of age, especially since I thought the owner’s list was
10 sufficient. Looking back, I realize that we should have been trying to
11 verify the ages of the “occupants,” not the “owners.” Accordingly, the
12 2007 Survey is a Survey of the age of the owners of certain residences and
13 not the age of the actual occupants of those residences.

14 Dkt. 132 at 2. Although these statements contradict certain aspects of the affidavit signed
15 by Drake (Dkt. 135-3 at 2) and Drake’s email to RISA’s former counsel (Dkt. 138-1), she
16 at least partially explains such contradictions in that what she understood to be her duty
17 in conducting the survey in 2007 is different than her current understanding of what she
18 was supposed to be doing. Dkt. 132 at 2. The fact that she used the term “occupants”
19 rather than “owners” in her email to RISA’s former counsel and the fact that Sanders’s
20 memo to Drake states that there were vacancies, indicating that they were aware of who
21 was actually occupying the homes, does not make Drake’s statement that she understood
22 the survey to be of owners, rather than residents, a sham, as the terms residents,
occupants, and owners appear to be used somewhat interchangeably, although the
meaning of the terms is now important. Rather, the Court can consider the evidence
presented by both parties, including Drake’s understanding of what RISA did, as well as
Sanders’s recollection of such events, in deciding the parties’ motions for summary

1 judgment. Accordingly, the Court concludes that Drake's declaration is not a sham and
2 will be considered by the Court.

3 **3. Court's Conclusions**

4 Because the Court concludes, as discussed above, that the declarations submitted
5 by Plaintiffs and RISA will be considered by the Court, the Court also concludes that
6 there remain genuine issues of material fact regarding the 2007 Survey that preclude a
7 ruling on summary judgment in either party's favor. For example, the parties presented
8 conflicting evidence regarding whether the 2007 Survey was conducted in a way that
9 surveyed owners, according to Plaintiffs, or occupants, according to RISA. In addition,
10 the parties presented conflicting evidence regarding whether the information previously
11 held by RISA was checked for its accuracy before being incorporated into the 2007
12 Survey and to what extent such information was used to prepare the 2007 Survey.

13 Accordingly, the Court concludes that the parties' motions for summary judgment are
14 denied.

15 **C. Enforcement of RISA's Bylaws**

16 In their motion for summary judgment, Plaintiffs argue that the Court need not
17 reach the issue regarding the validity of the 2007 Survey because RISA cannot enforce
18 age restrictions based on its bylaws as such restrictions are void under Washington law.
19 Dkt. 128 at 9-11. RISA contends that Washington law requires a party to file an in rem
20 proceeding to strike void provisions from public record using the process laid out in
21 RCW § 49.60.227 and that, because such an action was never filed and RISA's bylaws
22 were not stricken, the bylaws are currently enforceable, assuming RISA is otherwise

1 compliant with HOPA. Dkt. 136 at 23-24. Plaintiffs maintain that an action need not be
 2 commenced under RCW § 49.60.227 in order for RISA's bylaws to be considered void
 3 and therefore unenforceable under RCW § 49.60.224. Dkt. 142 at 1-2.

4 RCW 49.60.224 provides, in pertinent part, that “[e]very provision in a written
 5 instrument relating to real property which purports to forbid or restrict the conveyance,
 6 encumbrance, occupancy, or lease thereof to . . . families with children status . . . is void.”
 7 In addition, RCW 49.60.227 states:

8 If a written instrument contains a provision that is void by reason of
 9 RCW 49.60.224, the owner, occupant, or tenant of the property which is
 10 subject to the provision or the homeowners' association board may cause
 11 the provision to be stricken from the public records by bringing an action in
 12 the superior court in the county in which the property is located. The action
 13 shall be an in rem, declaratory judgment action whose title shall be the
 14 description of the property. The necessary party to the action shall be the
 15 owner, occupant, or tenant of the property or any portion thereof. The
 16 person bringing the action shall pay a fee set under RCW 36.18.012.

17 If the court finds that any provisions of the written instrument are
 18 void under RCW 49.60.224, it shall enter an order striking the void
 19 provisions from the public records and eliminating the void provisions from
 20 the title or lease of the property described in the complaint.

21 Plaintiffs argue that RISA's bylaws are void under RCW 49.60.224 and are
 22 therefore unenforceable because RISA was not compliant with HOPA between 2000 and
 23 2007, regardless of the fact that no party brought a suit under RCW 49.60.227 to have the
 24 provision stricken from public record. The parties have failed to cite to any case or
 25 statutory authority that explains how the Court must deal with a provision that was
 26 presumably void at one time under § 49.60.224, but is arguably no longer void and was
 27 never stricken from public record under § 49.60.227. However, the Court concludes that
 28 the only logical reading of § 49.60.224, as it applies to this set of facts, is that a provision

1 must be found “void” under that statute, which typically occurs in a proceeding under §
2 49.60.227 in order to be unenforceable. Here, a proceeding was never instituted and
3 therefore, a finding was never made that RISA’s bylaws were void under §
4 49.60.224. Where, as here, the Court is looking at a provision that may or may not be
5 currently enforceable, as opposed to a provision that restricts occupancy on the basis of
6 race, for example, which clearly would be unenforceable, and the provision was not
7 stricken from the public record at a time when it was void under the statute (i.e. when
8 RISA concededly was not compliant with HOPA), whether the provision is currently
9 enforceable remains at issue. Accordingly, the Court concludes that the issue of whether
10 RISA’s bylaws are void under RCW 49.60.224, and therefore unenforceable, remains at
11 issue and depends on RISA’s ability to show compliance with HOPA. As the Court
12 discussed above, triable issues of fact remain for a jury to decide in order for the Court to
13 make a legal determination regarding RISA’s compliance with HOPA and thus, the
14 enforceability of its bylaws.

15 III. ORDER

16 Therefore, it is hereby **ORDERED** that Plaintiffs’ motion for partial summary
17 judgment (Dkt. 128) and RISA’s motion for summary judgment regarding 2007 Survey
18 (Dkt. 133) are **DENIED**.

19 Dated this 20th day of July, 2012.

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BENJAMIN H. SETTLE
United States District Judge